Nos. 76-1314 and 76-1360

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIE LEE KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

EDDIE JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Page

Cases—continued:

Page

Constitution, statutes and rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1314

WILLIE LEE KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 76-1360

EDDIE JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 544 F. 2d 242.[1]

---

[1]Unless otherwise noted, "Pet." references are to the petition in No. 76-1314.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1976. A petition for rehearing was denied on February 2, 1977. Mr. Justice Stewart extended the time for filing the petitions for a writ of certiorari to and including April 4, 1977. The petition in No. 76-1314 was filed on March 18, 1977, and the petition in No. 76-1360 was filed on April 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures followed in selecting the grand jury that indicted petitioners complied with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the Jury Selection Plan of the United States District Court for the Eastern District of Michigan (No. 76-1314).

2. Whether the government improperly used the grand jury as an instrument for discovery in connection with petitioners' trial (No. 76-1314).

3. Whether petitioners' Sixth Amendment rights were violated by a meeting between government agents and one of petitioners' co-defendants, which was held without notifying the co-defendant's counsel (No. 76-1314).

4. Whether the government's applications for a wire interception order and an extension thereof were properly authorized under 18 U.S.C. 2516(1) (both petitions).

5. Whether the government's application for a wire interception order sufficiently established that other investigative procedures were inadequate, as required by 18 U.S.C. 2518(1)(c) (both petitions).

6. Whether, in the circumstances of this case, petitioners were properly convicted on five separate counts of possession with intent to distribute a controlled substance (No. 76-1314).

7. Whether, in the circumstances of this case, petitioners were properly convicted of substantive offenses committed by their co-conspirators in furtherance of the conspiracy (both petitions).

STATEMENT

On January 5, 1972, two indictments were returned in the United States District Court for the Eastern District of Michigan charging petitioners and a number of other persons with conspiracy to manufacture, distribute, and possess heroin and cocaine, in violation of 21 U.S.C. 846, and with numerous substantive narcotics offenses, in violation of 21 U.S.C. 841. In 1974 the two cases were tried simultaneously, without juries, before Judges Feikens and Pratt. Each of the petitioners, as well as many of the other defendants, was found guilty on the conspiracy count and several of the substantive counts and was fined and sentenced to a substantial prison term.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-51a).

Briefly, the evidence at trial established the existence from September through December 1971 of a wide-ranging narcotics conspiracy, known as the "Jackson organization" after its leader, petitioner Eddie Jackson (C.A. App. A 150-152, 180).[3] Petitioners Courtney Brown and Herbert Bell,

---

[2]The sentences imposed upon petitioners are set forth in the opinion of the court of appeals (Pet. App. 3a n. 1).

[3]"C.A. App. A" refers to Section A of the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court. The findings of fact of Judges Pratt and Feikens are reprinted at C.A. App. A 149-167 and 168-192, respectively. Judge Feikens' findings are also set forth at Pet. App., No. 76-1360, pp. 63a-88a.

along with co-defendant George Blair,[4] were Jackson's chief lieutenants (C.A. App. A 180). Petitioner Willie Lee Kilpatrick, who was also part of the organization's leadership, was involved in the procurement and distribution of narcotics (C.A. App. A 152-153), while petitioner Fairh Lee Riggs was a narcotics courier (C.A. App. A 180) and petitioners Alphonzo Jones, Samuel Horne, Ronald Garrett, Charles Rudolph, and Charles Cavanaugh were preferred customers and wholesale distributors for the organization (C.A. App. A 180-181, 183-184).

ARGUMENT

Each of the claims raised by petitioners was correctly resolved against them by the court of appeals in an extensive opinion upon which we principally rely.

1. Petitioners in No. 76-1314 contend (Pet. 33-34) that the members of the grand jury that indicted them were not selected in accordance with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the Jury Selection Plan of the United States District Court for the Eastern District of Michigan because an outdated voter registration list was used, an unauthorized person assisted the jury clerk in compiling names for the jury wheel, and jury selection records were improperly removed from the court house. These same claims, on identical facts, were rejected in *United States* v. *McNeal*, 490 F. 2d 206 (C.A. 6), certiorari denied, 419 U.S. 1020, in which the court of appeals found that the most recent available voter registration list for a federal general election had been used in selecting the grand

[4]This Court has denied the petitions for a writ of certiorari filed by defendant Blair and two other co-defendants, Leo Hurt and Cara Woods. See *Blair* v. *United States*, No. 76-1247, certiorari denied, April 18, 1977; *Woods* v. *United States*, No. 76-1213, certiorari denied, April 18, 1977; *Hurt* v. *United States*, No. 76-771, certiorari denied, January 17, 1977.

jury[5] and that the procedure followed by the jury clerk had otherwise been in substantial compliance with the statute and the local plan and was not prejudicial. Petitioners' objection to the manner in which the court of appeals applied the provisions of the Jury Selection and Service Act and the local jury selection plan to the circumstances of this case is not a question that merits review by this Court.[6]

2. Petitioners in No. 76-1314 argue (Pet. 47-52) that Roosevelt Nabors, a government informant, and Ruth Ann Burt, who testified as a government witness at trial, were called before the grand jury, after petitioners had been indicted, for the sole purpose of preparing the pending indictments for trial. As its recent decision in *United States* v. *Doss*, 545 F. 2d 548, 552 (C.A. 6), indicates,

[5]As we pointed out in our brief in opposition to the petition for a writ of certiorari in *McNeal* (No. 74-26), a copy of which we are sending to petitioners, the voter registration list for the 1968 federal primary election, held on August 6, 1968, was not available on August 1, 1968, when the filling of the master jury wheel was begun. Thus, the list for the 1966 federal general election was the most recent available list.

[6]*United States* v. *Guzman*, 468 F. 2d 1245 (C.A. 2), certiorari denied, 410 U.S. 937, and *United States* v. *Blair*, 470 F. 2d 331 (C.A. 5), certiorari denied *sub nom. Crews* v. *United States*, 411 U.S. 908, upon which petitioners rely, do not conflict with the decision below because they concerned the requirements of different local plans. Moreover, in each case the challenge to the jury selection procedure was rejected.

In the supplemental addendum to their petition for a writ of certiorari, petitioners in No. 76-1314 contend that there is a conflict between two recent decisions of the United States District Court for the Eastern District of Michigan. In those cases, however, the challenges to the jury selection process were based upon the failure to refill the master jury wheel every two years, as was then required by the local plan, and are therefore different from any of the issues that petitioners raise with regard to the selection of the grand jury that indicted them. In any event, any conflict between decisions of district judges in the Sixth Circuit should be resolved by the court of appeals. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.

the court of appeals has recognized that the government may not use the grand jury as "a discovery instrument to help the government prepare evidence to convict an already indicted defendant." Here, however, the court concluded, after an examination of the record, that petitioners "have presented nothing beyond their own unproved suspicions to prove that Burt and Nabors were improperly summoned before the grand jury for the sole or dominant purpose of preparing the pending indictments for trial" (Pet. App. 12a).[7] Further review of that factual determination is not warranted. Moreover, petitioners have not shown how they were prejudiced by the grand jury appearances of Nabors and Burt. See *United States* v. *Keen*, 509 F. 2d 1273, 1274-1275 (C.A. 6); *United States* v. *Braasch*, 505 F. 2d 139, 147 (C.A. 7), certiorari denied, 421 U.S. 910.[8]

3. Petitioners in No. 76-1314 contend (Pet. 53-57) that, after the indictments in these cases had been returned, a government attorney and Drug Enforcement Administration agents improperly met with co-defendant Blair, without notifying Blair's attorney, to explore the possibility of an immunity agreement. As the court of appeals observed (Pet. App. 21a), however, this meeting was arranged primarily by Blair's former common-law wife, Ruth Ann Burt, who was not then under indictment, rather than by the government. In these circumstances,

[7]The court of appeals also observed that the grand jury could legitimately inquire further into the crimes, despite the return of indictments, in order to determine whether other persons were involved (Pet. App. 12a). Thus, there is no conflict with *Beverly* v. *United States*, 468 F. 2d 732 (C.A. 5), which expressly sanctioned that use of the grand jury. *Id.* at 743.

[8]We note in addition that petitioners did not raise this issue in the district court (Pet. App. 12a).

the government attorney and D.E.A. agents could reasonably have believed that Blair had made a free and intelligent decision to attend the meeting without informing his counsel, who was also retained by several other defendants. Even if the government's conduct may have infringed Blair's Sixth Amendment rights,[9] petitioners have no standing to challenge that violation. In any event, as both lower courts found (Pet. App. 21a), none of the evidence at trial was derived from any statements made at this meeting, and petitioners have failed to demonstrate how the government's conduct contributed to their convictions. See *Massiah* v. *United States*, 377 U.S. 201, 207.

4. Petitioners claim (Pet. 58-61; Pet., No. 76-1360, pp. 31-38) that evidence obtained by means of a court-ordered wire interception should not have been admitted at trial because the applications for the original interception and for an extension thereof were not authorized by the Attorney General or by a designated Assistant Attorney General, as required by 18 U.S.C. 2516(1). Specifically, petitioners apparently argue that the delegation of authority to Acting Assistant Attorney General Petersen to approve these applications was ineffective because the Attorney General's memorandum was not designated as an "order" and issued in a separate numbered series, within the meaning of Department of Justice regulations (28 C.F.R. 0.180).

The court of appeals correctly held (Pet. App. 24a) that it was unnecessary to consider the validity of this delegation of authority under Departmental regulations in light of the district court's finding that the applications

[9]The Court has recently declined to review co-defendant Blair's claim that the meeting violated his constitutional rights. See p. 4 n. 4, *supra*.

in this case had in fact been approved by Attorney General John Mitchell. The government introduced the affidavit of an executive assistant to Attorney General Mitchell, which stated that the applications had been approved by the Attorney General, and also introduced memoranda from the Attorney General to the Acting Assistant Attorney General indicating the Attorney General's authorization of the wire interception applications.[10] Since the Attorney General personally authorized the applications, the district court properly refused to suppress the evidence obtained. See *United States* v. *Acon*, 513 F. 2d 513 (C.A. 3); see also *United States* v. *Chavez*, 416 U.S. 562.

5. Petitioners in No. 76-1360 contend (Pet. 22-31) that the affidavit of D.E.A. Agent Ronald Garibotto in support of the government's application for an order authorizing electronic surveillance (Pet. App., No. 76-1360, pp. 89a-105a) failed to include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The requirements of this section are satisfied when, viewed in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), the application and its supporting affidavit demonstrate to the court that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the

[10]Petitioners also argue that these memoranda should have been designated as "orders" pursuant to 28 C.F.R. 0.180. The court of appeals properly rejected this contention, since the statute does not require that the Attorney General's approval be given in any particular form, and even oral authorizations have been upheld. *United States* v. *Falcone*, 505 F. 2d 478, 481 (C.A. 3), certiorari denied, 420 U.S. 955; *United States* v. *Roberts*, 477 F. 2d 57, 61 (C.A. 7), certiorari denied, 417 U.S. 908.

identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied, *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F. 2d 219, 224 (C.A. 8).

The court of appeals properly concluded that this test has been satisfied in this case (Pet. App. 25a-26a). Contrary to petitioners' contention, the affidavit did not rely completely on the agent's experience in other narcotics cases. The affidavit also averred that other investigative procedures had been employed but had not uncovered the full scope of the Jackson organization, that additional surveillance would "jeopardize the outcome of the investigation" and "do little to reveal the manufacture and distribution network" because "JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units," and that a confidential informant, referred to as S-1, had not been able to obtain any further information about the organization (Pet. App., No. 76-1360, pp. 102a-103a).[11]

Although petitioners allege that the government failed to tell the issuing judge that its informant could have penetrated more deeply into the organization, the district

[11]These allegations in the agent's affidavit distinguish this case from *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9), cited by petitioners. In addition, as we have recently observed in our brief in opposition in *Scully* v. *United States*, No. 76-5918, certiorari denied, April 18, 1977, a copy of which we are sending to petitioners, *Kalustian* is inconsistent with decisions of other panels of the Ninth Circuit. Since, however, this case is distinguishable from *Kalustian*, and the Ninth Circuit has not yet resolved the proper standard to be applied within its jurisdiction for assessing the adequacy of compliance with Section 2518(1)(c), there is no need for the Court to consider the issue at this time.

court correctly concluded that the informant was not a reasonable source of additional evidence in this case. In view of the secrecy and complexity of the Jackson organization, the court found that "it would be unlikely that [the informant] could learn the extent of the alleged conspiracy even if he could have, in fact, infiltrated the organization" and that "with his lengthy prior criminal record, [the informant's] reliability, both during the investigation and as a witness at trial, was marginal at best" (C.A. App. A 116). Moreover, as noted above, the past use of an informant was not withheld from the court, since Agent Garibotto's affidavit expressly stated that the government had received some of its information from confidential informant S-1 (Pet. App., No. 76-1360, p. 92a). The mere possibility that the informant might have been able to obtain additional information was immaterial, and the omission of this speculative fact from the affidavit did not affect the validity of the authorization. See *United States* v. *Vento*, 533 F. 2d 838, 849-850 (C.A. 3); *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909.

6. Petitioners in No. 76-1314 claim (Pet. 62-65) that their indictment and convictions on five separate counts of possession with intent to distribute a controlled substance was improper in view of the fact that all five quantities of narcotics had been recovered from different locations in the organization's Hubbell Street headquarters in the course of a single search.[12] The court of appeals properly concluded (Pet. App. 13a) that under Fed. R.

[12]The five counts involved are Counts 12-16. The sentences imposed upon each of the petitioners on Counts 13-16 are to run concurrently with the sentence imposed upon Count 12. (Pet. App. 3a-4a n. 1). All of the petitioners with the exceptions of Kilpatrick and Riggs were fined on each of the counts.

Crim. P. 12(f) petitioners had waived their claim of multiplicitousness by the failure to raise it either before trial or at the close of the government's case, at which time the facts upon which the separate counts were based could have been adduced.

In any event, petitioners' argument is without merit. Two of the counts involved separate quantities of heroin hydrochloride of different strengths (681.80 grams at a strength of 19.3 percent and 2,589.93 grams at a strength of 58.1 percent). The other three counts involved separate quantities of cocaine hydrochloride of different strengths (659.66 grams at a strength of 15.8 percent, 45.30 grams at a strength of 5.1 percent and 14.66 grams at a strength of 32.7 percent). Moreover, each quantity was found in a separate place in the Hubbell Street premises. In these circumstances, petitioners' possession of the five separate batches of narcotics constituted different offenses (compare *United States* v. *Privett*, 443 F. 2d 528 (C.A. 9), with *United States* v. *Williams*, 480 F. 2d 1204, 1205 (C.A. 6)), and petitioners could properly have been convicted on each count.

7. Petitioners contend (Pet. 66-69; Pet., No. 76-1360, pp. 38-42) that the district court improperly applied the rule of *Pinkerton* v. *United States*, 328 U.S. 640, so as to find each conspirator guilty of all the substantive offenses committed by each of the other co-conspirators.[13] Petitioners do not

[13]Contrary to the assertion of the petitioners in No. 76-1314 (Pet. 66), *Pinkerton* did not hold that a member of a conspiracy cannot be held responsible for the crimes committed by his co-conspirators unless those crimes are listed in the indictment as overt acts done in furtherance of the conspiracy. As the Court stated in *Pinkerton* (328 U.S. at 647), "[a]n overt act is an essential ingredient of the crime of conspiracy * * * . If that can be supplied by the act of one conspirator, we fail to see why the same *or other acts* in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense" (emphasis added).

challenge the sufficiency of the evidence to sustain their conspiracy convictions. Rather, they suggest that some of the substantive offenses for which they were convicted took place before they had entered the conspiracy. However, the earliest substantive offense of which petitioners were convicted occurred on October 22, 1971, and the findings of the district judges clearly established that each of the petitioners had become part of the conspiracy well before that date.[14] Thus, none of the petitioners was convicted of crimes occurring prior to his entry into the conspiracy.[15]

Nor is there any merit to the suggestion that this Court should re-examine the *Pinkerton* rule. In the more than 30 years since *Pinkerton* was decided this Court has not questioned its continued validity or the wisdom of its rationale.[16]

---

[14]See C.A. App. A 152-153, 169-174, 181-186, 190.

[15]Once it is shown that a defendant has joined a conspiracy it is presumed that he has continued as a member until he affirmatively withdraws. See, *e.g.*, *United States* v. *Cullen*, 499 F. 2d 545, 547 (C.A. 9); *United States* v. *Goldberg*, 401 F. 2d 644, 648 (C.A. 2), certiorari denied, 393 U.S. 1099. The burden of establishing withdrawal is on the defendant. *United States* v. *Pearson*, 508 F. 2d 595, 597 (C.A. 5), certiorari denied, 423 U.S. 845; *United States* v. *Borelli*, 336 F. 2d 376, 388 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960.

[16]Indeed, the Court recently refused to consider an identical challenge to the *Pinkerton* rule by co-defendant Hurt. See p. 4, n. 4, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE,
*Acting Solicitor General.**

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT
PAUL J. BRYSH,
Attorneys.

MAY 1977.

---

*The Solicitor General is disqualified in this case.

DCJ-1977-05

see

76

1360